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Does the Sixth Amendment Demand That Co-Conspiring Witnesses Reveal Their Plea Bargains?

Marisa C. Maleck[†]

INTRODUCTION

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused individual in a criminal prosecution “to be confronted with the witnesses against him.”¹ At the heart of the Confrontation Clause is the ability to secure for the defendant the opportunity for cross-examination.² The Supreme Court has recognized that an important function of cross-examination is to expose a witness’s motivation for testifying.³ This is an especially important function when a co-conspirator of the defendant standing trial agrees to testify against the defendant in exchange for a reduced sentence of his or her own. A trial court cannot prohibit all inquiry into the possibility that the co-conspirator of the defendant has an incentive to lie in this context because a reasonable jury could find that a dismissal or reduction of pending criminal charges furnishes a co-conspiring witness with a motive for favoring the prosecution in his or her testimony.⁴ A defendant’s constitutional right is violated when “he shows that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness.”⁵ However, the question remains whether there is a Confrontation Clause violation when a trial court curtails some, but not all, of the inquiry into the details of the plea bargain between the co-conspiring witness and

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¹ US Const Amend VI.

² See *Davis v Alaska*, 415 US 308, 315–16 (1974).

³ *Id.* at 316–17, citing *Greene v McElroy*, 360 US 474, 496 (1959).

⁴ See *Delaware v Van Arsdall*, 475 US 673, 679 (1986) (finding a violation of the Confrontation Clause because all inquiry into the witness’s motive for testifying had been cut off).

⁵ *Id.* at 680.

the government. The federal appellate circuits disagree on whether a defendant's Confrontation Clause rights are violated when the trial court bars the defendant from cross-examining co-conspirator witnesses about the exact details regarding the sentence they avoided by cooperating with the government.⁶ Some circuits are concerned that such cross-examination would alert the jury to the mandatory minimum sentences faced by the defendant because presumably the co-conspiring witness would have faced the same sentence in the absence of the government cooperation agreement.⁷ These circuits seem to fear that a jury will be encouraged to nullify if the jury is alerted to the defendant's potential sentence and if the jury believes the sentence to be too harsh.⁸

This split is reflective of the discretion trial judges have to limit defense counsel's inquiry.⁹ Specifically, judges must balance the probative value of and need for certain evidence against the harm likely to result from its admission.¹⁰ Federal Rule of Evidence (FRE) 403 lays out the circumstances in which relevant evidence can be excluded on grounds of prejudice, confusion, or waste of time. FRE 403 provides in part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."¹¹ Thus, the issue to consider here is whether the probative value of understanding a witness's incentive to lie outweighs the prejudicial harm of the possibility of jury nullification.¹²

This Comment will suggest that the split among the circuits should be resolved by a bright-line rule. Namely, courts should

⁶ Contrast *United States v Reid*, 300 Fed Appx 50 (2d Cir 2008) (finding that the Sixth Amendment is not violated when inquiry is curtailed); *United States v Arocho*, 305 F3d 627 (7th Cir 2002) (same), superseded by statute on other grounds as recognized in *United States v Rodriguez-Cardenas*, 362 F3d 958 (7th Cir 2004); *United States v Cropp*, 127 F3d 354 (4th Cir 1997) (same); *United States v Luciano-Mosquera*, 63 F3d 1142 (1st Cir 1995) (same); with *United States v Larson*, 495 F3d 1094 (9th Cir 2007) (holding that the Sixth Amendment is violated when inquiry is curtailed); *United States v Chandler*, 326 F3d 210 (3d Cir 2003) (same).

⁷ See *Reid*, 300 Fed Appx at 52; *Arocho*, 305 F3d at 636; *Cropp*, 127 F3d at 358; and *Luciano-Mosquera*, 63 F3d at 1153.

⁸ See, for example, *Cropp*, 127 F3d at 358 (mentioning jury nullification as the prejudicial harm).

⁹ See *Van Arsdall*, 475 US at 679 ("[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned . . .").

¹⁰ See Herman L. Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 Vand L Rev 385, 392 (1952).

¹¹ FRE 403.

¹² See *Van Arsdall*, 475 US at 679 (considering the probative value/prejudicial harm balance in a case concerning the Confrontation Clause).

hold that the Sixth Amendment is violated when a judge bars the defense from questioning the co-conspiring witness about the details of his or her plea agreement with the government. I argue that the probative value of understanding the witness's incentive to lie outweighs the prejudicial harm of the possibility of jury nullification, especially in light of the fact that judges can minimize the potential for jury nullification by taking certain steps that do not implicate the Confrontation Clause.

This issue has particular salience during our current recession. Plea bargains are a predictable response to shrinking state and federal prosecutorial and judicial budgets because they are both inexpensive and efficient.¹³ Given the predictable rise in plea deals, resolution of this circuit split through a bright-line rule would lead to more efficient use of judicial resources.¹⁴ A bright-line rule gives certainty to courts, reducing the time that judges spend weighing this issue, reducing the work of appellate courts, and reducing the work for government prosecutors during appeals. Moreover, a bright-line rule increases predictability and allows prosecutors to appropriately value their plea deals.

Part I of this Comment reviews the major case law surrounding the circuit split regarding whether the Sixth Amendment demands that co-conspiring witnesses reveal the exact details of their plea bargains. Part II suggests that the other circuits' solutions are insufficient, and that a deeper understanding of jury nullification is required. I conclude with my solution that the probative value of understanding the witness's incentive to lie outweighs the prejudicial harm of the possibility of jury nullification, especially in light of the fact that judges can minimize the potential for jury nullification by taking certain steps that do not implicate the Confrontation Clause.

I. CIRCUIT SPLIT

Part I of this Comment summarizes the various approaches advocated by each circuit. Part I.A–D details the positions of the First, Second, Fourth, and Seventh Circuits, which have all held that the Confrontation Clause is not violated when a judge cur-

¹³ See Richard A. Posner, *Economic Analysis of Law* 607–08 (Aspen 5th ed 1998) (suggesting that a settlement disposition is cheaper than a trial).

¹⁴ See, for example, Lynda Waddington, *Culver on More Cuts to Judiciary Budget: "Absolutely Not,"* Iowa Indep (Jan 14, 2010) (suggesting that during the recession "the [Iowa] public should expect to wait longer for trial and hearing dates, and anticipate that pressures to offer plea bargains will increase"), online at <http://iowaindependent.com/25714/culver-on-more-cuts-to-judiciary-budget-absolutely-not> (visited Oct 2, 2010).

tails inquiry into the exact details of a plea agreement between a prosecutor and co-conspiring witnesses.¹⁵ These circuits suggest that the defendant is generally able to expose the potential biases of the co-conspiring witness without the disclosure of the mandatory minimum sentence they would have been subjected to if they had not entered into a plea agreement.¹⁶ Additionally, these circuits believe that the avoidance of prejudicing the jury in regard to what sentence the defendant should receive, and thus the avoidance of jury nullification, is a valid reason to curtail cross-examination inquiry.¹⁷ Part I.E–F details the Third and Ninth Circuits' positions. In contrast to their sister circuits, these circuits have held that the Confrontation Clause is violated when a court prohibits the defendant from asking witnesses about specific sentences they avoided by entering into a plea bargain.¹⁸

A. The First Circuit's Position

The First Circuit recently suggested that the Confrontation Clause is satisfied if the defendant's counsel had an opportunity to ask the co-conspiring witness if he or she had received or hoped to receive a sentencing benefit from the prosecution in exchange for his or her testimony.¹⁹ In *United States v Luciano-Mosquera*,²⁰ the defendant Pagan-San-Miguel sought a new trial or reversal of his guilty conviction for a firearms count related to a conspiracy to import cocaine. Pagan-San-Miguel argued that his Confrontation Clause rights were violated because the district court cut off cross-examination into the exact penalties that his co-conspirator-turned-government-witness, Castillo-Ramos, would have faced on the firearms count, which was dropped against him. The First Circuit denied that this cross-examination limitation was an abuse of the trial court's discretion because of the low probative value of information about the precise number of years that Castillo-Ramos would have faced had he been charged for the offense. The Circuit held that there was sufficient evidence before the jury from which it could "make a discriminating appraisal of the possible biases and motivations of [Castillo-

¹⁵ See *Luciano-Mosquera*, 63 F3d 1142; *Reid*, 300 Fed Appx 50; *Cropp*, 127 F3d 354; *Arocho*, 305 F3d 627.

¹⁶ See, for example, *Luciano-Mosquera*, 63 F3d at 1153.

¹⁷ See, for example, *Cropp*, 127 F3d at 358.

¹⁸ See *Chandler*, 326 F3d 210; *Larson*, 495 F3d 1094.

¹⁹ *Luciano-Mosquera*, 63 F3d at 1153.

²⁰ 63 F3d 1142 (1st Cir 1995).

Ramos].”²¹ In other words, the First Circuit found that any probative value of information about the precise number of years that Castillo-Ramos would have faced absent government cooperation was slight. Specifically, the First Circuit found that the probative value of the precise number of years was outweighed by the potential for prejudice. The court feared that the jury would be prejudiced if it learned how many years Castillo-Ramos would have faced because the jury could infer that Pagan-San-Miguel faced the same sentence.²² The court did not explicitly state how learning of the defendant’s sentence through inference would prejudice the jury, but it is reasonable to assume that the court feared that the jury would nullify if it thought the sentence was too harsh.

B. The Second Circuit’s Position

The Second Circuit recently held that the Sixth Amendment’s Confrontation Clause was not violated when a district court barred cross-examination regarding specific penalties a cooperating witness would have faced had he not cooperated with the government.²³ The defendant in *United States v Reid*²⁴ was convicted of conspiracy to commit robbery, five counts of robbery, and five counts of possessing a firearm in furtherance of a crime.²⁵ Reid appealed his conviction in part because he alleged that the trial court had improperly barred his cross-examination of the government’s cooperating witnesses. The Second Circuit affirmed the guilty conviction after reviewing for abuse of discretion. Reid had elicited testimony from the cooperating witnesses reflecting their incentive to lie and unearthing their past criminal histories. The Second Circuit noted that the trial court did not want to expose the jury to potentially prejudicial information regarding sentencing.²⁶ Again, the court did not specify why this information would be prejudicial; perhaps the court was concerned about the potential for jury nullification. Ultimately, the Second Circuit offered very little analysis in *Reid*, but cited the First Circuit’s decision in *Luciano-Mosquera* approvingly.²⁷

²¹ *Id.*, citing *Brown v Powell*, 975 F2d 1, 5 (1st Cir 1992).

²² *Id.* at 1153.

²³ See generally *Reid*, 300 Fed Appx 50.

²⁴ 300 Fed Appx 50 (2d Cir 2008).

²⁵ *Id.* at 51.

²⁶ *Id.* at 52.

²⁷ *Id.*

C. The Fourth Circuit's Position

The Fourth Circuit recently upheld a guilty conviction where the district court limited the defendants' ability to cross-examine government witnesses about the incentive to lie created by plea agreements.²⁸ *United States v Cropp*²⁹ concerned a cocaine conspiracy in which many of the government's witnesses were the defendant's co-conspirators. The defense was allowed to ask co-conspiring witnesses whether they had signed plea agreements, whether they had faced a "severe penalty" prior to cooperating, and whether they had expected to receive lesser sentences as a result of their plea agreements. The defense was not allowed to ask questions about the specific penalties that the witnesses would have faced had they not cooperated with the government or about the specific benefits they hoped to receive due to their cooperation. The district court implied that asking witnesses about the sentences they expected to receive would undermine the court's discretion to ultimately decide those sentences. Specifically, the court noted that the jury might nullify if it could deduce the long sentences faced by the defendants from knowing the sentences faced by their co-conspiring witnesses.³⁰

The defendants argued that the length of the possible reduction in sentence was itself relevant to establish co-conspiring witnesses' bias because "the greater a sentence faced by a witness absent cooperation, the less believable the testimony of the witness."³¹ However, the Fourth Circuit specifically sided with the First Circuit in *Luciano-Mosquera*, noting that any probative value from the jury's knowledge of the number of years faced by the witness absent cooperation was slight and not worth the prejudicial impact.³² The Fourth Circuit adopted the First Circuit's standard: "[T]he proper inquiry for a reviewing court is whether the jury possesses sufficient evidence to enable it to make a 'discriminating appraisal' of bias and incentives to lie on the part of the witnesses."³³ The Fourth Circuit noted that there was no reason to think that questions about exact sentences feared or hoped for were necessary when the jury under-

²⁸ See generally *Cropp*, 127 F3d 354.

²⁹ 127 F3d 354 (4th Cir 1997).

³⁰ *Id.* at 358.

³¹ *Id.* at 359.

³² *Id.*

³³ *Cropp*, 127 F3d at 359, citing *Luciano-Mosquera*, 63 F3d at 1153.

stood that the witnesses were co-conspirators who would face severe penalties if they did not testify for the government.³⁴

D. The Seventh Circuit's Position

The Seventh Circuit recently upheld cross-examination restrictions regarding the details of penalties co-conspiring witnesses would have received absent cooperation with the government.³⁵ In *United States v Arocho*,³⁶ co-conspirators Allen and Hernandez were originally charged with numerous counts of drug-related offenses. They entered into plea agreements in which they agreed to testify against their co-conspirators (appellants) in exchange for pleading guilty to one count of conspiracy. At trial, Allen and Hernandez testified that the government had dropped the drug-related charges against them in exchange for their testimony implicating appellants.³⁷ The men told the jury that they expected to receive a "substantial benefit" at their sentencing in exchange for their testimony.³⁸ Appellants attempted to cross-examine Allen and Hernandez about the details of the specific sentences and sentencing guidelines ranges they faced. The government filed a motion *in limine* to curtail the inquiry and the district court granted the motion. The district court feared that the jury would be prejudiced in regard to the sentences appellants faced if they learned of the sentences faced by their co-conspirators absent government cooperation.³⁹

The Seventh Circuit held that the district court did not abuse its discretion in barring cross-examination about the specific guidelines range and sentences because the jury learned that Allen and Hernandez expected to receive substantial benefits for their testimony.⁴⁰ The Seventh Circuit emphasized the importance of the district court judge's jury instruction, which indicated that the jury should consider Allen and Hernandez's testimony with great care because of the benefits the men expected to receive.⁴¹ Finally, the Seventh Circuit held that the district court's concern that the jury would be able to infer the sentences faced by the appellants by hearing about the

³⁴ See *Cropp*, 127 F3d at 359.

³⁵ See generally *Arocho*, 305 F3d 627.

³⁶ *Id.* at 635.

³⁷ *Id.* at 635–36.

³⁸ *Id.* at 636.

³⁹ *Arocho*, 305 F3d at 636.

⁴⁰ *Id.*

⁴¹ *Id.*

sentences faced by their co-conspirators Allen and Hernandez was valid.⁴² In other words, the Seventh Circuit found that the potential for jury nullification outweighed any benefit that the jury would receive by understanding the specific versus general benefits the witnesses received by cooperating with the government.

E. The Third Circuit's Position

In *United States v Chandler*,⁴³ the Third Circuit overturned the defendant Chandler's drug conspiracy conviction, finding that the trial court's decision to bar certain cross-examination testimony regarding the penalties faced by the co-conspiring witnesses violated Chandler's rights pursuant to the Confrontation Clause of the Sixth Amendment.⁴⁴ Two co-conspirators testified against Chandler, one who had already received a sentence reduction in exchange for his testimony, and one who had been promised a reduction of her sentence in exchange for her testimony.⁴⁵ During Chandler's trial a co-conspirator, Sylvester, admitted that he was testifying pursuant to a plea agreement between himself and the government. Sylvester admitted that he had agreed to plead guilty to charges of selling three ounces of cocaine, to cooperate with law enforcement agents, and to actively work with them to identify and apprehend the leader of the drug conspiracy (not Chandler). In exchange the government overlooked the fact that Sylvester had dealt with about five kilograms of cocaine rather than three ounces of cocaine.⁴⁶ The other government witness, Yearwood, had not been sentenced before Chandler's trial. On direct examination she admitted that she had pleaded guilty to trafficking in between fifteen and fifty kilograms of cocaine, and had agreed to assist the government in ongoing drug investigations by wearing a wire during meetings with drug dealers. She testified that she hoped her cooperation would result in the government reducing her sentence.⁴⁷ The trial court barred Chandler's counsel from asking Sylvester or Yearwood about the difference between the sentences they would

⁴² *Id.*

⁴³ 326 F3d 210 (3d Cir 2003).

⁴⁴ See generally *Chandler*, 326 F3d 210.

⁴⁵ *Id.* at 216.

⁴⁶ *Id.* at 216–17.

⁴⁷ *Id.* at 217.

have received absent cooperation and the sentences they either had received or hoped to receive as a result of cooperation.⁴⁸

The Third Circuit held that Chandler's Confrontation Clause rights were violated because she was not able to effectively expose the witnesses' potential biases and motivations for testifying against her and because the limitations did not fall within the "reasonable limits" which the district court was authorized to impose on the defendant's right to cross-examine.⁴⁹ The Third Circuit first considered whether the district court inhibited Chandler from inquiring into the witnesses' motives to testify, concluding that "a reasonable jury could have reached a significantly different impression of Sylvester's and Yearwood's credibility had it been apprised of the enormous magnitude of their stake in testifying against Chandler."⁵⁰ The Third Circuit next considered whether the district court's limitation of cross-examination fell within the District Court's discretion to impose "reasonable limits" on a defendant's right of cross-examination.⁵¹ The government asserted that the interest in restricting the defense counsel's inquiry stemmed from a fear of jury nullification, but the Third Circuit held that such an interest was outweighed by Chandler's right to confront witnesses against her.⁵² Lastly, the Third Circuit considered whether the conviction should nevertheless be affirmed pursuant to the harmless error doctrine, and concluded that the sentence should be vacated because the error was not harmless.⁵³

F. The Ninth Circuit's Position

In *United States v Larson*,⁵⁴ the Ninth Circuit, sitting en banc, found that the defendants' rights under the Confrontation Clause had been violated when they were barred from questioning their co-conspiring witnesses about the mandatory minimum sentences that the witnesses would have received had they not testified.⁵⁵ Defendants were each charged with one count of conspiracy to possess methamphetamine with intent to distribute. The government approached defendants' co-conspirator, Lamere,

⁴⁸ See *Chandler*, 326 F3d at 218.

⁴⁹ *Id.* at 222–23.

⁵⁰ *Id.* at 222 (quotation marks omitted).

⁵¹ See *id.* at 219.

⁵² *Chandler*, 326 F3d at 223.

⁵³ *Id.* at 224.

⁵⁴ 495 F3d 1094 (9th Cir 2007).

⁵⁵ *Larson*, 495 F3d at 1094.

and informed him that he faced a statutory mandatory minimum sentence of life imprisonment without the possibility of release because he had at least two prior felony drug convictions. Lamere and another conspirator, Poitra, entered into plea agreements and agreed to testify against defendants in exchange for the government's agreement to file motions for reduced sentences.⁵⁶ On direct examination, Lamere testified that he had pleaded guilty to conspiring to distribute more than 500 grams of methamphetamine and that he testified in hopes that he would receive a reduced sentence.⁵⁷ On direct examination Poitra admitted to being charged with conspiring to possess methamphetamine with intent to distribute and to cooperating with the expectation that the government would move to reduce her sentence. She further testified that she expected to face at least five years of prison time if she did not cooperate with the government, before the prosecutor objected to the testimony.⁵⁸ The district court sustained the objection but did not strike Poitra's testimony.⁵⁹ The district court refused to allow Larson's counsel to cross-examine Lamere about the sentence he would have faced had he not cooperated with the government because the court noted that the sentencing of a defendant was up to the court to decide.⁶⁰ Presumably, the district court feared that the jury would nullify if it understood how much time Lamere faced because it would be able to deduce how much time defendants faced. The Ninth Circuit originally upheld the conviction, reasoning that the Confrontation Clause was not violated. But sitting en banc, the Ninth Circuit reversed its original decision with regard to the Sixth Amendment issue (while upholding defendants' convictions because the district court's error was harmless).⁶¹

The Ninth Circuit considered three factors in determining whether a defendant's Confrontation Clause right to cross-examination was violated: (1) whether the excluded evidence was relevant; (2) whether there were other legitimate interests outweighing the defendant's interest in presenting the evidence; and (3) whether the exclusion of evidence left the jury with sufficient information to assess the credibility of the witness.⁶² This test

⁵⁶ Id at 1097.

⁵⁷ Id at 1098.

⁵⁸ Id.

⁵⁹ *Larson*, 495 F3d at 1103.

⁶⁰ Id at 1104.

⁶¹ Id at 1096.

⁶² Id at 1103, citing *United States v Beardslee*, 197 F3d 378, 383 (9th Cir 1999).

roughly implements Federal Rule of Evidence 403. The Ninth Circuit held that Poitra's incentive to testify for the government had been sufficiently exposed and so there was no Confrontation Clause error.⁶³ However, the Circuit held that Lamere's incentive to testify had not been sufficiently exposed because he faced a mandatory minimum sentence of life imprisonment in the absence of cooperation with the prosecution. The Ninth Circuit found that this excluded evidence was relevant to assessing Lamere's testimony because "the mandatory nature of the potential sentence, the length of the sentence, and the witness' obvious motivation to avoid such a sentence cast considerable doubt on the believability of the witness' testimony."⁶⁴ The Ninth Circuit further suggested that the proffered interest of the trial court in barring the testimony was insufficient. While the Ninth Circuit found that the jury was able to get a sense that Lamere was testifying in exchange for some benefit, the fact that the jury was not able to learn of the magnitude of the benefit received was inadequate under the Confrontation Clause.⁶⁵ It is not clear from the opinion whether the court held that Poitra's incentive to testify had been exposed because, even though the objection was sustained, the minimum sentence length (five years) was low whereas a minimum of life is high, or if they held that her incentive to testify had been exposed because the judge did not strike her testimony from the record. It is probably the case that the court thought the fact that the judge did not strike her testimony from the record sufficiently exposed her motive to testify, because the court wrote:

Where a plea agreement allows for *some* benefit or detriment to flow to a witness as a result of his testimony, the defendant must be permitted to cross-examine the witness sufficiently to make clear to the jury what benefit or detriment will flow, and what will trigger the benefit or detriment, to show why the witness might testify falsely in order to gain the benefit or avoid the detriment.⁶⁶

Ultimately the Court held that a "reasonable jury might have received a significantly different impression of [Lamere's]

⁶³ *Larson*, 495 F3d at 1103.

⁶⁴ *Id* at 1104.

⁶⁵ *Id* at 1105.

⁶⁶ *Id* (emphasis added), citing *United States v Schoneberg*, 396 F3d 1036, 1042 (9th Cir 2005).

credibility had . . . counsel been permitted to pursue his proposed line of cross-examination.”⁶⁷ However, the Ninth Circuit concluded that the Confrontation Clause error was harmless because the government’s case against defendants was strong even without Lamere’s testimony.⁶⁸

II. PROPOSED SOLUTION

Part II of this Comment argues that the Sixth Amendment is violated when inquiry into the specific details of the plea bargain is curtailed. Part II.A examines whether the split could be resolved by adopting the majority perspective advocated by the First, Second, Fourth, and Seventh Circuits, and concludes that the split should not be resolved in such a manner. Part II.B examines whether the split could be resolved by reading the Third and Ninth Circuit’s holdings in *United States v Larson* and *United States v Chandler* narrowly, and concludes that the split should not be resolved in such a manner. Part II.C argues that the Sixth Amendment requires inquiry into the specific details of the plea bargain. Specifically, I suggest that the circuits have not sufficiently balanced the probative value of evidence against the harm of prejudice, as required by Federal Rule of Evidence 403. The circuits have not fully considered whether jury nullification is a significant harm; instead the circuits have assumed, without analysis, that jury nullification is a prejudicial harm. Moreover, the circuits have excessively focused on the probative value aspect of the jury’s understanding of the witnesses’ incentives to cooperate, to the detriment of analyzing the jury nullification aspect. Finally, I argue that my solution saves costs because it is a bright-line rule that gives certainty to courts, reducing the time that judges spend weighing this issue, reducing the work on appellate courts, and reducing the work for government prosecutors during appeals.

A. Majority Perspective

The First, Second, Fourth, and Seventh Circuits have held that the Confrontation Clause is not violated when a judge curtails inquiry into the exact details of a plea agreement between a prosecutor and co-conspiring witnesses.⁶⁹ These circuits have

⁶⁷ *Larson*, 495 F3d at 1106, citing *Van Arsdall*, 475 US at 680.

⁶⁸ See *Larson*, 495 F3d at 1108.

⁶⁹ See *Luciano-Mosquera*, 63 F3d 1142; *Reid*, 300 Fed Appx 50; *United States v*

suggested that the magnitude of the reduction in sentence garnered by a plea agreement has little probative value.⁷⁰ However, the obvious critique of this finding is the fact that the magnitude of the reduction seems quite probative. It seems fair to assume, for example, that a conspiring witness might not be honest with the prosecution in exchange for a two-year reduction, but might testify honestly in exchange for a fifteen-year reduction. Moreover, a jury often has no context in which to evaluate testimony where the witness alleges that he or she is receiving a considerable or substantial benefit from the government in exchange for his or her testimony. In other words, a jury might not understand what a "considerable" or "substantial" benefit is, whereas the meaning of "considerable" or "substantial" may be clear to a judge. These circuits do not offer any analysis as to how juries should process the general information that the witness entered into a plea agreement with the government. Rather, the probative value of such evidence attaches when the jury is given detailed information about how the witness benefits by testifying against the defendant.

Additionally, these circuits have held that the avoidance of prejudicing the jury in regard to what sentence the defendant should receive, and thus avoiding jury nullification, is a valid reason to curtail cross-examination inquiry. However, these circuits do not offer any normative reasons why jury nullification should be considered harmful, nor do they explain whether jury nullification actually occurs in this context.

B. A Narrow Reading of the Minority Perspective

The Ninth Circuit's holding in *Larson* might be limited to cases in which the cooperating witness faces a mandatory sentence in the absence of a motion by the government. In contrast, *Larson* may not apply in cases where cooperating witnesses face potential maximum sentences, rather than mandatory minimum sentences.⁷¹ The reconciliation of the circuit split in this way has legal support. The Ninth Circuit attempted to distinguish its decision in *Larson* from *United States v Cropp* on such grounds because *Cropp* only involved the exclusion of testimony regarding

Cropp, 127 F3d 354; *United States v Arocho*, 305 F3d 627.

⁷⁰ See, for example, *Luciano-Mosquera*, 63 F3d at 1153.

⁷¹ See *Larson*, 495 F3d at 1106 ("The potential maximum statutory sentence that a cooperating witness *might* receive, however, is fundamentally different from the *mandatory* minimum sentence that the witness *will* receive in the absence of a motion by the Government.") (emphasis in original).

the potential sentence that the witness faced in the absence of cooperation with the government.⁷²

However, the Ninth Circuit in *Larson* cited *United States v Chandler* approvingly, suggesting that the holding is not limited to cases involving cooperating witnesses facing mandatory sentences.⁷³ The cooperating witnesses in *Chandler* faced severe sentences absent government cooperation, but did not face life sentences or mandatory sentences.⁷⁴ Second, reconciling the split in this way would mean that the probative value of the jury knowing that a witness is subject to a mandatory sentence outweighs the prejudice this information produces. In contrast, the probative value of the jury knowing that a witness is subject to a potential maximum sentence would not outweigh the prejudice this information produces. In sum, under this approach a defendant's Sixth Amendment rights are violated when a judge curtails questions regarding a witness's potential mandatory sentence but not when a judge curtails questions regarding a witness's potential maximum sentence.

This rule suggests that the probative value of plea bargain details in situations where the co-conspiring witness would have faced a mandatory sentence but not a discretionary sentence should outweigh the harm of prejudice, in this case jury nullification. This logic seems questionable. For example, a mandatory sentence could be lower than a potential sentence; thus, a co-conspiring witness might have an incentive to lie when facing a high potential sentence but not when facing a low mandatory sentence. Contrary to what this approach predicts, the probative value would be greater in this high potential sentence context, rather than in this low mandatory sentence context. Furthermore, the prejudicial impact of jury nullification is contingent on how high the sentence is and not whether the sentence is mandatory or discretionary, assuming juries nullify when they believe the sentence to be too harsh.⁷⁵ But a jury is no more likely to

⁷² *Larson*, 495 F3d at 1106 n 12, citing *Cropp*, 127 F3d at 359.

⁷³ *Larson*, 495 F3d at 1107, citing *Chandler*, 326 F3d at 222.

⁷⁴ *Chandler*, 326 F3d at 222 (Sylvester pleaded guilty to an offense with a twelve- to eighteen-month Guidelines sentencing range and received only one month of house arrest and probation when he could have been charged with a greater offense; Yearwood faced a Guidelines minimum sentence of upwards of twelve years and testified that she expected the government to move for a reduced sentence in exchange for her testimony.).

⁷⁵ See Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury about Mandatory Sentencing Consequences*, 95 Colum L Rev 1232, 1233 (1995) ("[The] criminal jury, through its nullification power, is intended to function . . . as a political check on the government's power to promulgate unpopular laws and overly harsh punishments.").

nullify when a mandatory sentence is low than when a potential sentence is low. In sum, there is nothing inherent about a mandatory sentence versus a discretionary sentence that should affect the probative/prejudice balance required by Federal Rule of Evidence 403.

Moreover, the circuit split should not be resolved by reading the Ninth and Third Circuits' holdings narrowly to suggest that the Sixth Amendment is not violated when inquiry into plea bargain details is curtailed in situations where the benefit received by agreeing to cooperate is marginal. But this solution has some legal support. In *United States v Larson*, the Ninth Circuit explicitly adopted the Third Circuit's central holding in *United States v Chandler*: the Sixth Amendment is violated when the jury cannot properly ascertain the magnitude of the witnesses' incentives to lie, which sometimes requires exposing the details of the witnesses' plea bargains.⁷⁶ The Third Circuit has implied that *Chandler* should be read narrowly:

The circumstances of the present case do not require us to resolve whether the Confrontation Clause entitles a defendant categorically to inquire into the "concrete terms" of a cooperating witness's agreement with the government, including the specific sentence that witness may have avoided through his cooperation. Rather, we need only decide whether, if the trial court had not prohibited Chandler from cross-examining Sylvester and Kathleen Yearwood with respect to the *magnitude* of the sentence reduction they believed they had earned, or would earn, through their testimony, the jury might have "received a significantly different impression of [their] credibility."⁷⁷

It remains unclear whether the Third Circuit and the Ninth Circuit will always find that the Confrontation Clause has been violated in cases where the trial court bars cross-examination about specific penalties cooperating witnesses face. At best, these cases suggest that no Confrontation Clause violation occurs when the trial court bars cross-examination about specific penalties faced by cooperating witnesses in cases where the sentence reduction earned by the cooperating witness is marginal.

However, a major critique of this approach is that it is unclear what it means for a sentence reduction to be marginal. For

⁷⁶ See *Larson*, 495 F3d at 1107, citing *Chandler*, 326 F3d at 222.

⁷⁷ *Chandler*, 326 F3d at 221, citing *Van Arsdall*, 475 US at 680.

example, in *United States v Cropp* the co-conspiring witnesses would have faced sentences of between ten and twenty years in prison if they had not cooperated with the government.⁷⁸ The plea-bargained sentence reduction for the conspiring witnesses is not clear from the record because the trial court did not allow specific questions regarding the benefit received. However, ten to twenty years might be considered a severe sentence that defendants would want to avoid, and the incentive to lie would emerge assuming that the prosecutor agreed to reduce the sentence even by a year. The *Chandler* co-conspiring witnesses faced less initial time in prison than did those in *Cropp*, yet, unlike the Fourth Circuit in *Cropp*, the Third Circuit in *Chandler* held that the jury needed to be told the exact details of co-conspiring witnesses' plea agreements so as to appreciate the increased incentives to lie based on the magnitude of the benefits received.⁷⁹ Thus, it does not seem possible to resolve the circuit split based on the magnitude of benefit received by the co-conspiring witness in exchange for testimony against the defendant.

C. Proposed Solution

District judges might be concerned that a discussion of sentences will impinge on the court's discretion to impose a sentence. In particular, a discussion of mandatory minimums that co-conspirators face for the same crime that the defendant stands trial for may result in jury nullification, because a discussion of what will be in store for the defendant, should the jury find him or her guilty, could cause the jury to acquit. Here, the concern is that the potential for jury nullification outweighs the probative value of the information received through forcing a witness to reveal the details of his or her plea agreement.⁸⁰

The problem of considering jury nullification to be a prejudicial impact is a two-fold inquiry. First, empirically, do juries nullify rather than finding defendants guilty when they know that their co-conspirators face high sentences? Juries first must deduce that the sentence faced by the co-conspirator is the same sentence faced by the defendant, which is not always the case. Moreover, it is impossible to determine whether juries acquit

⁷⁸ *Cropp*, 127 F3d at 359.

⁷⁹ *Chandler*, 326 F3d at 222.

⁸⁰ Consider *Cropp*, 127 F3d at 358 ("The district court was also concerned that if the jury could infer the very long sentences faced by the appellants from knowing the sentences faced by the conspirators, the jury members would hesitate to find the appellants guilty even if the evidence proved their guilt.").

defendants because they believe that there is not enough evidence to convict or because they find the high sentence to be distasteful.⁸¹ The majority perspective is that nullification is a rare problem.⁸² Moreover, our judicial system is based on an assumption that juries are able to do their jobs properly.⁸³

But perhaps more importantly, is jury nullification in the context of sentencing harmful? At least one author notes that judges have oftentimes informed the jury of sentencing faced by the defendant, suggesting that the law implicitly allows for and encourages nullification in this context.⁸⁴ It is worth discussing the justification for and historical origins of jury nullification in order to determine whether it is harmful in the FRE 403 balancing context. The history of jury nullification is richly detailed in a federal district court opinion, *United States v Polizzi*.⁸⁵ According to presiding Judge Weinstein, the Supreme Court has revitalized an originalist method of interpreting the Sixth Amendment in recent years. Thus, lower federal courts are required to recognize “a basic element of the Sixth Amendment as originally understood: the jury of the vicinage, being aware of the sentencing implications of a finding of guilt, had the frequently exercised power to refuse to follow the law as construed by the court, and could acquit or downgrade the crime in order to avoid a sentence

⁸¹ There is a lack of rigorous empirical evidence on jury nullification. However, there is some anecdotal evidence that jury nullification occurs more frequently in communities of color where a disproportionately high number of minorities face criminal charges. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L J 677, 679–80 (1995) (noting that some black jurors may vote to acquit black defendants on the basis of race).

⁸² See Valerie P. Hans and Neil Vidmar, *Judging the Jury* 130–49 (Plenum Press 1986) (suggesting that empirical studies indicate that the modern American jury does not often nullify, but rather generally bases its verdict on the evidence and faithfully attempts to follow legal principles given by the judge).

⁸³ Id at 251 (“Our final judgment on the jury system is a positive one. Despite some flaws, it serves the cause of justice very well. For over 700 years it has weathered criticism and attack, always to survive and to be cherished by the peoples who own it. Adaptability has been the key to its survival. It should remain open to experimentation and modification, but those who would wish to curtail its powers or abolish it should bear the burden of proof. Defenders of the jury clearly have the weight of the evidence on their side.”). But see Dale W. Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U Chi L Rev 386 (1954) (questioning the ability of the jury to fulfill its fact-finding role); Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 Hastings L J 579, 581 (1993) (stating that “in the early twentieth century the jury was subjected to some of the sharpest criticism in its long history”).

⁸⁴ See Nathan Greenblatt, *How Mandatory Are Mandatory Minimums? How Judges Can Avoid Imposing Mandatory Minimum Sentences*, 36 Am J Crim L 1, 18–27 (2008).

⁸⁵ 549 F Supp 2d 308, 322–23 (EDNY 2008), vacd *United States v Polouizzi*, 564 F3d 142 (2d Cir 2009).

it deemed excessive.”⁸⁶ Judge Weinstein suggested that, not only is it permissible for a jury to nullify based on knowledge of a mandatory sentence, but that such nullification might be required.⁸⁷ In fact, in *Polizzi*, Weinstein concluded that the trial court had impermissibly violated the Sixth Amendment when it denied a defendant’s request to inform the jury of the statutory mandatory five-year minimum applicable to the charges he faced. Weinstein ordered a new trial in which the jury would be required to inform the jury of the mandatory sentence the defendant faced.⁸⁸

However, *Polizzi* was overturned by the Second Circuit, partially because it found that there is no Sixth Amendment right to an instruction on the applicable mandatory minimum sentence.⁸⁹ Specifically, the Second Circuit held that the district court was bound to follow its prior precedent, *United States v Pabon-Cruz*.⁹⁰ *Pabon-Cruz* was decided in the wake of *Shannon v United States*.⁹¹ In *Shannon*, the Supreme Court rejected the argument that an instruction on the sentencing consequences of the jury’s verdict was “required as a matter of general federal criminal practice.”⁹² The Court in *Shannon*, the Second Circuit in *Pabon-Cruz* noted, “left open the possibility that it might be ‘necessary under certain limited circumstances’ to instruct a jury regarding the sentencing consequences of its verdict,” but the Second Circuit held that the mandatory minimum circumstances in *Pabon-Cruz* were not among the “limited circumstances” in which such an instruction might be required.⁹³

Weinstein’s opinion that jury nullification is a positive is not without opposition. In *State v Ragland*,⁹⁴ a trial judge instructed the jury that it must also find the defendant guilty of a

⁸⁶ Id at 322.

⁸⁷ Id (“The complexity of modern United States criminal law and the general public’s lack of detailed knowledge of federal statutory provisions require that, in the few cases where necessary, the jury be informed of such matters as the required minimum term of incarceration that will follow from its verdict so that it can exercise its constitutionally mandated historic role. Cases which have rejected this view, on the ground that it permits a form of impermissible ‘nullification,’ have not followed the Sixth Amendment as it must be interpreted after recent Supreme Court originalist holdings.”).

⁸⁸ Id at 323.

⁸⁹ See *Polouizzi*, 564 F3d at 160.

⁹⁰ 391 F3d 86, 94–95 (2d Cir 2004) (“[D]efendant had no legal right to a charge informing the jury of the sentencing consequences of its decisions.”).

⁹¹ 512 US 573 (1994).

⁹² See id at 584–85.

⁹³ See *Pabon-Cruz*, 391 F3d at 95.

⁹⁴ 105 NJ 189 (1986).

possession charge if it found that the defendant had a weapon during the commission of a robbery. The defendant appealed his conviction, on the grounds that the word “must” conflicted with the jury’s nullification powers, and demanded that the jurors be instructed of their nullification rights. The New Jersey Supreme Court emphatically held that the power of jury nullification is not an essential component of the Sixth Amendment and upheld the conviction.⁹⁵ The Court further suggested that jury nullification is “undesirable” because “only our elected representatives may determine what is a crime and what is not, and only they may revise that law if it is found to be unfair or imprecise; only they and not twelve people whose names are picked at random from the box.”⁹⁶ The Court also noted that jury nullification led to cynicism towards the justice system and completely arbitrary results. Finally, the Court concluded that jury nullification violated the rule of law.⁹⁷ Judge Weinstein and the Supreme Court of New Jersey’s differing opinions toward jury nullification seem to reflect dissimilar first principles: each thinks of the comparative institutional capacities of the jury and the legislature in different ways. Judge Weinstein seems to believe that juries will make just (non-arbitrary) decisions and nullify when enforcement of the legislature’s law will lead to an egregious outcome. In contrast, the Supreme Court of New Jersey seems to believe that juries’ decisions will be arbitrary and legislatures’ decisions will be well thought out and representative.

This analysis calls into question whether jury nullification is as harmful as some courts make it out to be. Ultimately, the circuit split could be resolved by requiring courts to avoid the potential for jury nullification by taking steps that would not implicate the Confrontation Clause. For example, recently judges have increased judicial control over jurors by issuing authoritative jury instructions.⁹⁸ A host of cases suggests that judges can per-

⁹⁵ *Id.* at 201–02.

⁹⁶ *Id.* at 205.

⁹⁷ *Id.* at 208–09 (“The fundamental defect in jury nullification is obvious. It is a power that is absolutely inconsistent with the most important value of Western democracy, that we should live under a government of laws and not of men. . . . With jury nullification, these free people are told, either explicitly or implicitly, that *they* are the law, that what the sovereign has pronounced ahead of time either may or may not be followed, and that if they want to, they may convict every poor man and acquit every rich man; convict the political opponent but free the crony; put the long-haired in jail but the crew-cut on the street; imprison the black and free the white; or, even more arbitrarily, just do what they please whenever they please.”).

⁹⁸ See B. Michael Dann, “*Must Find the Defendant Guilty*” *Jury Instructions Violate the Sixth Amendment*, 91 *Judicature* 12 (2007) (noting that a “survey of the states’ and

missibly discourage nullification.⁹⁹ A judge should also consider that empirical data suggests jury nullification is rare¹⁰⁰ when comparing its prejudicial harm to the probative value generated from the jury learning about the exact sentences faced by the witness in absence of government cooperation. In sum, the balancing test set out in Federal Rule of Evidence 403 suggests that the rule should disfavor the majority perspective because the probative value of and need for evidence about the incentives of the witnesses outweighs the harm of nullification, which is unlikely to result from its admission.

The major critique of this argument is that such a rule will decrease the incentive to plea bargain. In turn, this could further burden the workload for the district court, the appellate court, and the attorneys, which is problematic especially in these troubling economic times. Moreover, given the current federal prosecutors' focus on financial crimes, prosecutors need to be able to use tools that are inexpensive and efficient like plea bargains in non-financial crime contexts, like the drug context discussed throughout this Comment. Furthermore, a rule preventing defense counsel from questioning the co-conspiring witness about the exact benefit he or she received through the plea may lead to more plea agreements, which will further the government's prosecution abilities by freeing up judicial resources that would otherwise have to be spent on a trial. Presumably prosecutors will be less likely to offer a plea to a co-conspiring witness if the trial court does not bar cross-examination about specific benefit received. The prosecutors object because they fear that their witness will look less credible to a jury and the jury will be less likely to convict the defendant.

I present three counterarguments to this critique. First, having a bright-line rule can decrease costs through certainty.¹⁰¹ A

federal circuits' corresponding jury instruction language reveals that 24, almost 40 percent, of state courts and federal circuits use the command 'must' or its equivalent ('shall' or 'duty') to point to verdicts of guilty when all of the elements of the alleged crime have been proven. Another 7, or 13 percent, use the milder admonition 'should' to steer the jury's decision to guilt.").

⁹⁹ See *United States v Thomas*, 116 F3d 606 (2d Cir 1997) (ruling that jurors can be removed if there is evidence that they intend to nullify the law, under Federal Rules of Criminal Procedure 23(b)); *United States v Krzyske*, 836 F2d 1013 (6th Cir 1988) (upholding defendant's conviction on appeal after the jury convicted the defendant after asking the judge about jury nullification, and the judge responded, "There is no such thing as valid jury nullification"); *United States v Dougherty*, 473 F2d 1113 (DC Cir 1972) (affirming the de facto power of a jury to nullify the law but upholding the denial of jury instructions about the power to nullify).

¹⁰⁰ See Hans and Vidmar, *Judging the Jury* at 130–49 (cited in note 82).

¹⁰¹ See generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42

bright-line rule gives certainty to courts, reducing the time that judges spend weighing this issue, reducing the work on appeals courts, and reducing the work for government prosecutors during appeals. My solution makes it clear *ex ante* that the Confrontation Clause is violated if a trial court curtails inquiry into the specific details of a co-conspiring witnesses' plea agreement with the government. Resolving the circuit split in favor of the majority perspective will result in a standard. The Supreme Court has previously held that trial courts cannot curtail *all* inquiry into a witness's motivation to lie.¹⁰² This means that if the circuit split is resolved in favor of the circuits that have held that the Sixth Amendment is not *necessarily* violated if a trial court curtails inquiry, the question remains, when is the Sixth Amendment violated? The answer becomes case specific, and the uncertainty that remains will encourage appeals, which in turn might increase costs and burden federal prosecutors.

Second, a standard of leaving the choice to a judge to curtail or allow cross-examination wastes resources. At the margin, the increased value of the testimony in cases where the judge curtails cross-examination will increase the value of the bargain for prosecutors. The problem is that the prosecutor cannot predict the value of the testimony because he or she does not know how the trial judge will rule, or whether the decision will be a ground for appeal. The prosecutor wastes time trying to figure out the probability that the bargain will be valuable to the government, which also increases the costs of negotiation. The prosecutor loses the value he or she bargained away to secure the less valuable testimony if he or she guesses wrong. The prosecutor might value the testimony less and secure more jail time for the co-conspirator if he or she knew all along whether the plea bargain terms would be revealed to the jury. Thus, public resources could be spent more efficiently in terms of jail time per dollar. A bright-line rule is created only if the circuit split is resolved in favor of holding that the Sixth Amendment is violated where trial judges curtail cross-examination regarding plea bargains of co-conspiring witnesses. A standard is created if the circuit split is resolved in favor of holding that the Sixth Amendment is not necessarily violated where trial judges curtail inquiry. This is because the question remains as to how much and in what context a trial judge can curtail inquiry without running afoul of the

Duke L J 557 (1992).

¹⁰² See *Davis*, 415 US at 315.

Sixth Amendment. Creating certainty for the prosecutor in regard to the value created by the testimony of a co-conspiring witness will better save judicial resources as the prosecutor will know how to value a plea bargain.

Third, the circuits that have held that the Sixth Amendment is not violated when the defense is barred from asking about the details of plea agreements premise their decisions on the idea that revealing the specific benefit received has little probative value and high prejudicial value in the form of jury nullification. For prosecutors and defenders of broad prosecutorial power, the jury nullification concern may be a proxy for another concern. Namely, the concern might be that requiring the jury to hear the exact details of plea bargains will make witnesses look less credible to a jury and the jury will be less likely to convict the defendant. However, it is troubling if this is the actual concern. The Constitution is simply not concerned with whether a prosecutor's incentive to offer the plea is diminished. The fact that the prosecutor objects to the cross-examination because they fear that their witness will look less credible to a jury and the jury will be less likely to convict the defendant goes to the heart of the Confrontation Clause itself.

CONCLUSION

There is a split of authority among the circuit courts as to whether the Sixth Amendment demands that a co-conspirator of the defendant admit the exact details of his or her plea agreement in court, thus allowing the jury to make inferences regarding whether the witness had an incentive to cooperate with the government and perhaps lie in exchange for a reduced sentence.

This Comment rejects the majority position of the circuits that all the Sixth Amendment demands is that the witness admit that he or she has benefited by cooperating with the government. The Federal Rules of Evidence, in particular Rule 403, demand that courts balance the probative value of and need for certain evidence against the harm likely to result from its admission. The majority of circuits simply have not engaged properly in the probative/prejudice balance by assuming without analysis that jury nullification is a problem and that plea details have little probative value. This Comment also rejects the logic proffered by those circuits that have held the Sixth Amendment requires witnesses to discuss details of their plea agreements. These circuits overly focus on the probative value of the testimony, without discussing the prejudice aspect of the FRE 403 equation. This

Comment has suggested an alternative solution with explicit reference to FRE 403. Namely, judges should minimize the rare occurrence of jury nullification by taking steps that do not implicate the Confrontation Clause. Judges should find that the harm of jury nullification is low and is easily outweighed by the probative value of evidence regarding a co-conspiring witness's incentive to cooperate.

